

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

CO-OPERATIVE OIL ASSOCIATION, INC.,  
an Association,

*Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

---

## PETITION FOR REHEARING

---

*Upon Appeal from the United States Board of  
Tax Appeals.*

---

ARTHUR A. GOLDSMITH

Residence: Portland, Oregon,

J. L. EBERLE,

Residence: Boise, Idaho,

WALTER GRIFFITHS,

Residence: Caldwell, Idaho,

Attorneys for Petitioner.

---

---

FILED

DEC 23 1940

PAUL P. O'BRIEN,

CLERK



No. 9393

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

CO-OPERATIVE OIL ASSOCIATION, INC.,  
an Association,

*Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

---

**PETITION FOR REHEARING**

---

To the Ninth Circuit Court of Appeals and the Honorable Judges thereof:—

Comes now the Petitioner, Co-operative Oil Association, Inc., in the above entitled cause, and presents this, its Petition for a Rehearing of the above entitled cause, and in support thereof respectfully shows:—

## I.

This Court erred in assuming that the Petitioner must show some statutory provision authorizing the deduction of its savings or earnings. It is unnecessary for the Petitioner to show that there was any such statutory provision or that it is the object of legislative grace by pointing to any statute, as Congress can only tax income as defined in the Sixteenth Amendment to the Constitution of the United States. The Petitioner states that as a non-profit cooperative association, its savings or earnings, so-called "patronage dividends", were mere over-charges that must be refunded to its patrons. They represent the difference between the actual cost and the prices charged, and the balance is not a profit, but a liability to the patrons.

## II.

This Court erred in holding that the Board of Tax Appeals found that the earnings not paid out in dividends was not a liability to members. The finding of the Board of Tax Appeals was as follows: "No money was paid to members other than pursuant to resolution of the Board of Directors. The portion of the current savings not released to members by authority of such resolutions was retained by the Petitioner, entered on its books as, 'Reserve for Working Capital', and carried on its balance sheet as a liability to its members." (Italics ours.) Thus the finding of the Board of Tax Appeals expressly recognizes that the part of the savings retained was actu-

ally treated as a liability to its members. (Tr. of Record, p. 28.) It is thus clear that the amounts in question were not taxable income under the Sixteenth Amendment to the Constitution of the United States.

### III.

This Court and the Board of Tax Appeals erred in not holding that under the Cooperative Marketing Act of the State of Idaho, the Petitioner's Articles of Incorporation, By-Laws and Marketing Agreement, the savings or earnings, *without any corporate action or act of appropriation* accrue immediately as a liability to the members. By proper corporate action of the Board of Directors or of the Stockholders, part of such earnings or savings might have been withheld as reserve funds, but the record shows that no such action was taken by either the Board or the Stockholders. Under the facts in this case no act of appropriation was necessary to vest the ownership of the savings in the members. On the other hand, an act of appropriation by the Board of Directors or Stockholders would be necessary to withhold such earnings for the reserve fund, and no such action was taken. *Consequently no income accrued to the Petitioner, although the savings did accrue as income to the members of Petitioner in proportion to their patronage.*

### IV.

This Court erred in not holding that this case was governed by the case of *Uniform Printing & Supply Co.*

*vs. Commissioner*, 88 Fed. (2d) 75; *Valley Waste Disposal Co.*, 38 B. T. A. 452, and similar cases.

WHEREFORE, Upon the foregoing grounds, it is respectfully urged that this Petition for a rehearing be granted and that the judgment of the Board of Tax Appeals be upon further consideration reversed.

Respectfully submitted,

ARTHUR A. GOLDSMITH,  
Residence: Portland, Oregon,

J. L. EBERLE,  
Residence: Boise, Idaho,

WALTER GRIFFITHS,  
Residence: Caldwell, Idaho,  
Counsel for Petitioner.

#### CERTIFICATE OF COUNSEL

I, Arthur A. Goldsmith, of counsel for the above named Co-operative Oil Association, Inc., do hereby certify that the foregoing Petition for a Rehearing of this cause is presented in good faith and not for delay.

ARTHUR A. GOLDSMITH,  
Counsel for Petitioner.